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No. 83-1619

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IN THE
Supreme Court of the United States
October Term 1983

**CHEMICAL BANK and
WASHINGTON PUBLIC POWER SYSTEM,**

Petitioners,

v.

GARY ASSON, et al.,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF IDAHO**

**RESPONSE OF CITY OF HEYBURN TO
PETITION FOR CERTIORARI**

**STEVEN A. TUFT
CHURCH, CHURCH, SNOW & TUFT
P.O. Box 1286
Burley, Idaho 83318
(208) 678-9088**

April 27, 1984

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Heyburn requests that the petition of Chemical Bank and Washington Public Power Supply System (hereinafter "petitioners") for issuance of a Writ of Certiorari to the Supreme Court of the State of Idaho be denied.

Position of the City of Heyburn

The city of Heyburn maintains that it (and the other four Idaho cities) had constitutional and statutory authority to enter into the Participants Agreements with Washington Public Power Supply with regard to nuclear projects 4 and 5. The Idaho Supreme Court concluded that the five Idaho cities did not have authority pursuant to its construction of Article 8, Section 3 of the Idaho Constitution (Opinion contained at Appendix A of Petition for Certiorari also reported as 105 Idaho 422, 670 P. 2d 839).

Heyburn does not agree with the decision of the Idaho Supreme Court. It seems to have ruled contrary to the previously announced tests for constitutionality of such agreements set forth in *Pocatello v. Peterson*, 93 Idaho 774, 473 P. 2d 644 (1970), without overruling it or adequately distinguishing it. However, Heyburn cannot find sufficient grounds to petition this court for a Writ of Certiorari. There appears to be no vested right of any person in decisions of a court and a change of decision of a state court does not unconstitutionally impair a contract or property right of persons relying upon prior decisions of that court. *Fleming v. Fleming*, 264 U.S. 29 (1924). While Heyburn disagrees with the decision, it was rendered by the highest court competent to rule thereon. The decision is now part of the body of law of the state of which Heyburn is a political subdivision. Heyburn finds no lack of any due process nor can it join in petitioners' other grounds for review.

Reasons why the Writ should be Denied

Heyburn maintains that the arguments set forth in the Petition for Certiorari of Chemical Bank and Washington Public Power Supply System are not grounds for issuance of the writ as follows:

(a) *Reliance On Facts Outside The Record.* Petitioners have set forth numerous facts which are not in the

record. The Idaho Supreme Court case was an original proceeding and was tried on a stipulated statement of facts, a copy of which has been previously forwarded to this court by the ratepayer respondents. Petitioners allege that the respondent municipalities by their actions have effected some form of unconstitutional taking or otherwise unconstitutionally impaired the bondholders' property or contract rights. In arriving at their conclusion, they set forth numerous facts which are, at best, in dispute and were never part of the record. A summary review of the stipulated facts which constituted the record before the Idaho Supreme Court will clearly substantiate this statement. As examples are such allegations as the cities' "guarantee" of the bonds, the cities' "abrupt" reversal of position, and other statements implying that the cities "deliberately created" or "repeatedly reinforced bondholder expectations." Such statements are disputed by the municipal respondents and, in any event, alien to the record before this court.

(b) *Mootness*. The same parties to this petition were also involved in the case of Chemical Bank of New York, Plaintiff, versus Washington Public Power Supply System, et al, Defendants, in the Superior Court of the State of Washington, in and for the County of King, Case No. 82-2-06840, the Honorable Joseph Coleman presiding. The Washington State Supreme Court reversed an interlocutory order of Judge Coleman and went on to hold that the Washington municipalities and public utility districts lacked statutory authority under Washington law to enter into the Participants Agreements with Washington Public Power Supply System with regard to Projects 4 and 5. Based thereon, Judge Coleman ruled orally on August 9, 1983, that the remaining participants (which included the five Idaho cities) were relieved of any contractual obligation to make payments to the Washington Public Power Supply System with regard to such Participants Agreements, basically, on a theory of

frustration of purpose. Such oral decision was reduced to a written decision on August 11, 1983. A copy of the written decision is attached as Exhibit "1".

It is the position of the City of Heyburn that such decision by Judge Coleman rendered moot the need for a decision from the Idaho Supreme Court as to the authority of the five Idaho cities to enter into the Participants Agreements. Heyburn firmly maintains that the Idaho Supreme Court opinion issued on September 26, 1983, holding the Idaho cities without constitutional authority to enter into the contracts was superfluous and moot, the cities having been relieved of any contractual obligation to make payment by Judge Coleman. The decision of the Idaho Supreme Court need not be reviewed by this court for the same reason.

(c) *Lack Of Merit*. The allegations of petitioners, that the proceeding before the Idaho Supreme Court constituted an unconstitutional taking of bondholders' property or interference of contract or contractual expectations of the bondholders are frivolous and not supported by the authorities set forth in the petition.

Conclusion

As disappointing as the decision of the Idaho Supreme Court was, the City of Heyburn regrettably concedes that such grounds do not constitute sufficient basis for issuance of the writ.

Thus, the City of Heyburn concludes that this Honorable Court is obliged to deny the writ.

DATED this 27th day of April, 1984.

Respectfully Submitted,

STEVEN A. TUFT, ESQ.

Church, Church, Snow & Tuft
P.O. Box 1286
Burley, Idaho 83318
(208) 678-9088

Counsel for Respondent,
City of Heyburn

EXHIBIT 1

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

CHEMICAL BANK,
a New York corporation,
Plaintiff,

v .

WASHINGTON PUBLIC POWER
SUPPLY SYSTEM, a Washington
municipal corporation and joint
operating agency; et al.,

Defendants.

No. 82-2-06840-3

ORDER AND
JUDGEMENT

On June 15, 1983 the Washington Supreme Court filed an Opinion on discretionary review of certain orders entered by this court on November 16, 1982 and January 4, 1983. Plaintiff Chemical Bank ("Chemical") and defendant Washington Public Power Supply System ("WPPSS") thereafter filed a motion for reconsideration. On July 22, 1983 the Washington Supreme Court entered its Order Denying Motion For Reconsideration and issued its Mandate directing this court to proceed in accordance with the June 15, 1983 Opinion.

Following the announcement of the Washington Supreme Court's Opinion on June 15, 1983, the various defendants listed in Exhibit A attached hereto (hereinafter called the "moving defendants") filed motions in this court for summary judgment or entry of judgment or filed joinders in such motions.

Oral argument on the motions was heard before the undersigned judge of this court on August 8, 1983. All parties and their counsel were given an opportunity to pre-

sent their arguments, and the court heard and has duly considered all arguments presented at the hearing. In addition, the court has read and has duly considered the pleadings, papers and materials filed in this action which are listed in the Appendix attached hereto and by this reference incorporated herein.

The court announced its oral decision on the aforesaid motions on August 9, 1983. For the reasons set forth in the court's oral decision, a copy of which is attached hereto and by this reference incorporated herein, it is hereby

Ordered, Adjudged and Decreed as follows:

1. In compliance with the mandate of the Washington Supreme Court, the defendants which are Washington public utility districts or Washington municipalities lacked authority to enter into said Agreement and as to them the Agreement is *ultra vires*, void *ab initio*, invalid, ineffective and unenforceable;

2. Inasmuch as the Participants' Agreement is *ultra vires*, void *ab initio*, invalid, ineffective and unenforceable as to the defendants which are Washington public utility districts or Washington municipalities, and by reason thereof, the Participants' Agreement is also ineffective and unenforceable as to all other moving defendants and all participant defendants, on the grounds of (a) contract indivisibility and failure of the condition of substantially 100% participation, (b) mutual mistake as to the authority of Washington public utility districts and municipalities to enter into the Agreement, and (c) frustration of purpose and impracticability.

3. For the aforesaid reasons, none of the moving defendants or any other participant defendant is obligated, under or by virtue of the Participants' Agreement or WPPSS Board of Directors Resolution No. 890, as amended (the "Bond Resolution"), to make any payment to WPPSS, or to any other defendant, or to Chemical or any

purchaser or holder of bonds issued by WPPSS in connection with the Projects;

4. The defenses, arguments, objections and contentions raised by Chemical and WPPSS in opposition to the aforesaid motions for summary judgment or entry of judgment, including but not limited to any defenses, arguments, objections or contentions relating to estoppel, waiver, laches, ratification, restitution, unjust enrichment, Article 8 of the Uniform Commercial Code or alleged control by participants of affairs relating to the Projects, are hereby rejected and overruled for the reasons stated in the court's oral opinion;

5. Chemical's complaint for declaratory relief is dismissed, with prejudice, and the moving defendants are to be awarded their taxable costs against Chemical and WPPSS; and

6. There is no just reason for delay in entering this Order And Judgment, which is hereby expressly directed to be entered pursuant to CR 54(b).

DONE IN OPEN COURT this 11th day of August, 1983.

By: /s/ H. Joseph Coleman

H. Joseph Coleman
Judge of the Superior Court

Presented by:

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By: /s/ David F. Jurca

David F. Jurca
Attorneys for Columbia Defendants

Approved as to form:
BETTS, PATTERSON & MINES

By: /s/ Michael Mines

Michael Mines
Attorneys for Chemical Bank

GORDON, THOMAS,
HONEYWELL, MALANCA,
PETERSON & O'HERN

By: /s/ Albert R. Malanca

Albert R. Malanca
Attorneys for Washington Public
Utility Group

EXHIBIT A

Columbia Defendants:

Columbia Rural Electric Association, Inc.
Blachly-Lane County Cooperative Electric Assoc.
Central Electric Cooperative, Inc.
Columbia Basin Electric Cooperative, Inc.
Consumers Power, Inc.
Coos-Curry Electric Cooperative, Inc.
Douglas Electric Cooperative, Inc.
Hood River Electric Cooperative
Lane Electric Cooperative, Inc.
Midstate Electric Cooperative, Inc.
Salem Electric
Umatilla Electric Cooperative Association
Wasco Electric Cooperative, Inc.
Kootenai Electric Cooperative, Inc.
Fall River Rural Electric Cooperative, Inc.
Lost River Electric Cooperative, Inc.
Raft River Rural Electric Cooperative, Inc.

21 Defendants:

City of Bandon
City of Bonners Ferry
City of Burley
Clearwater Power Company
Elmhurst Mutual Power & Light
Glacier Electric Cooperative
City of Heyburn
Idaho County Light & Power
City of Idaho Falls
Northern Lights, Inc.
Ohop Mutual Light
Okanogan County Electric Cooperative
Parkland Light & Water Co.
Prairie Power Cooperative
City of Rupert

Rural Electric Association
Unity Light & Power
Wells Rural Electric
City of Centralia, Washington
City of Port Angeles, Washington
Town of McCleary, Washington

9 Defendants:

Big Bend Electric Cooperative, Inc.
City of Milton-Freewater, Oregon
Lincoln Electric Cooperative, Inc.
Missoula Electric Cooperative, Inc.
Ravalli County Electric Cooperative, Inc.
Salmon River Electric Cooperative, Inc.
Tanner Electric Cooperative
Vera Irrigation District No. 15
Vigilante Electric Cooperative, Inc.

Oregon PUDs:

Central Lincoln People's Utility District
Clatskanie People's Utility District
Northern Wasco County People's Utility District
Tillamook People's Utility District

Washington Public Utilities Group:

Public Utility District No. 1 of Benton County
Public Utility District No. 1 of Clark County
Public Utility District No. 1 of Cowlitz County
Public Utility District No. 1 of Grays Harbor Co.
Public Utility District No. 1 of Lewis County
Public Utility District No. 1 of Mason County
Public Utility District No. 3 of Mason County
Public Utility District No. 1 of Okanogan County
Public Utility District No. 2 of Pacific County
Public Utility District No. 1 of Skamania County
City of Tacoma, Washington

Others:

Benton Rural Electric Association
City of Springfield
City of McMinnville
Lower Valley Power & Light, Inc.
City of Canby, Oregon (Canby Electric Board)
City of Cascade Locks, Oregon
City of Drain, Oregon
Orcas Power and Light Company
Alder Mutual Light Company
Nespelem Valley Electric Cooperative, Inc.
Town of Steilacoom, Washington
Public Utility District No. 1 of Franklin County
City of Blaine, Washington
Public Utility District No. 1 of Klickitat County
City of Sumas, Washington
Public Utility District No. 1 of Clallam County
City of Ellensburg, Washington
Public Utility District No. 1 of Wahkiakum County
Public Utility District No. 1 of Pend Oreille County
City of Richland, Washington
Public Utility District No. 1 of Chelan County
Public Utility District No. 2 of Grant County
Public Utility District No. 1 of Snohomish County
Public Utility District No. 1 of Douglas County
Inland Power & Light Company